No. 85-1865

Supreme Court, U.S.
FILED
MAY 8 1986
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CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

MARC LEE BERGER,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED

1. Should marijuana be excluded at trial where the marijuana is discovered during an illegal warrantless aerial search and where the officers use the discovery to obtain and execute a search warrant; and
2. Did Petitioner have an objectively reasonable expectation of privacy in the area within 40-80 yards of his rural home?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

Petitioner, Marc Lee Berger, respectfully prays that a Writ of Certiorari issue to review the majority opinion of the California Court of Appeal which affirmed the Superior Court's

holding that the challenged overflight did not violate Petitioner's rights under the United States Constitution.

OPINION BELOW

The Court of Appeal opinion in this case was filed on December 23, 1985, and was unpublished.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3) on the ground that his rights under the Fourth Amendment to the United States Constitution were violated.

The California Court of Appeal entered its order rejecting Petitioner's Fourth Amendment claim on December 23, 1985. (Appendix at p. 1).

The California Supreme Court denied a hearing in this case on March 20, 1986. (Appendix at p. 26). The instant Petition for Writ of Certiorari is filed within 60 days of that order.

CONSTITUTIONAL PROVISIONS

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

During the summer of 1982, rural areas of Monterey County, California, were used by law enforcement agencies as an area in which to train officers in the skill of aerial surveillance for marijuana cultivation (RT 75:3; 258:12).[1/] This area included Petitioner's property, a ranch of approximately 360 acres. Prior to the

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1/ "RT" refers to the Reporter's Transcript from the Preliminary Examination which is contained in the record in the Court of Appeal.

overflights, law enforcement had uncorroborated information from an unknown informant indicating that marijuana was being grown in a greenhouse in the area of Petitioner's property (RT 32:19; 47:12; 216:22).

After sighting what they believed to be marijuana, officers made several more investigative passes over the property to confirm their suspicions and to educate the officer-students (RT 31:20; 64:25; 408:21; 413:9; 476:7). On the basis of the information thus obtained, a search warrant was obtained; its execution yielded over 70 marijuana plants (RT 377:7-379:13).

Petitioner's Fourth Amendment claim was made in, and rejected by, both the Superior Court and the Court of Appeal. In his motion to suppress evidence in Superior Court, Petitioner stated, quoting People v. Sneed (1973)

32 Cal. App. 3d 535, 108 Cal. Rptr. 146 [emphasis supplied]:

> Though a person may have consented to observations from some sources and by some persons and therefore cannot have a reasonable expectation of privacy as to those sources or persons, he does not thereby forego his Fourth Amendment protection as to intrusions from all sources and by all persons, and particularly has not waived his right to privacy as to government agents.

The Superior Court denied the motion to suppress on November 15, 1983. See Appendix at p. 24.

In the Court of Appeal, Petitioner raised his Fourth Amendment claim at page 5 of his opening brief by "contend[ing] that the warrantless aerial surveillances of his residence and adjacent property constitute[d] an infringement on his right to be free from governmental intrusions that violate the Fourth Amendment of the United States Constitution, made applicable to the

states through the Fourteenth Amendment to the United States Constitution..."

Petitioner contended that the searched area in question was not an "open field" within the meaning of Oliver v. United States (1984) 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214, and that therefore "that area is to 'remain private'."

Petitioner's conviction was affirmed on December 23, 1985. See Appendix at p. 1.

REASONS FOR GRANTING THE WRIT

This case presents an intriguing issue, one of widespread importance to the bench, bar, and law enforcement nationwide. That issue is the inter-relationship of the "fruit of the poisonous tree" doctrine and the "good faith" exception to the exclusionary rule.

In this case the marijuana was discovered during an allegedly unlawful

aerial search of the Petitioner's property. Based on the information thus obtained, officers obtained a search warrant. Execution of the warrant turned up contraband, including the very marijuana plants first viewed (without a warrant) from the air.

Assuming the aerial surveillance constituted an illegal search, all evidence obtained as a result thereof should be excluded from trial as "fruit of the poisonous tree." Will the result be different when a search warrant is the result of an illegal search (i.e., the "poisoned fruit")? Isn't reliance on the "good faith" exception misplaced where the challenged search is not the search pursuant to the warrant, but rather the original warrantless search (which directly led to the warrant)?

In this case both Petitioner and Respondent are correct in their

assertions. Yes, the warrant was, in fact, obtained as a direct result of an illegal search; and yes, the officers acted in good faith on a facially valid search warrant. The tension thus presented is clear, as is the need for a definitive resolution.

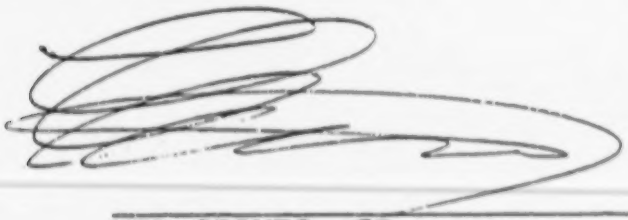
The legality of the original discovery is, of course, a key issue. The property herein is situated in an area that can be characterized as neither suburban nor as a vast expanse of ranch or undeveloped woods. The instant property is something between those poles, as are many properties in this country to which people move to avoid intrusions into their privacy. The extent of the privacy rights of such people is open to question, as noted in the opinion of the Court of Appeal at footnote 2 (Appendix at p. 8) [Propriety of curtilage/non-curtilage distinction in analysis of

reasonableness of aerial surveillance is open to question].

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal.

Dated: April 30, 1986



MEL GRIMES, JR.
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARC LEE BERGER,

Defendant and Appellant.

(A026332)

(Monterey County
Sup. Ct. No. MCR 4878)

A criminal defendant, convicted by plea of cultivating marijuana and possessing hashish, complains on appeal that the evidence seized in a law enforcement raid on defendant's ranch should have been suppressed, because

sheriff's officers had made observations on which a search warrant for defendant's ranch was based by means of warrantless airplane flights over the ranch, and because television news crews accompanied the officers who participated in the execution of that search warrant.

The judgment is affirmed.

Statement of Facts

Testimony at the preliminary hearing in this case revealed the following facts.

On July 27 and 28, 1982, Monterey County sheriff's officers, acting on a tip, used airplanes to fly over defendant's property, a 360-acre ranch in the upper Carmel Valley, at estimated altitudes of 500 feet to 2,000 feet above the ground. The officers saw marijuana plants growing there. After consultation with a deputy district attorney, the officers obtained a search warrant for

defendant's property.

On July 29, 1982, numerous officers went to defendant's property to serve the search warrant. Film crews from the American Broadcasting Company accompanied the officers and filmed their activities, which included the arrest of defendant and two other persons who were on the property. The officers found and seized hashish which was on defendant's person, cocaine which was in a jar under an abandoned building, and over 70 marijuana plants which were growing in three gardens connected to each other and to defendant's trailer home by footpaths.

Procedural History

An information filed August 15, 1983, accused defendant of cultivation of marijuana (Health & Saf. Code, §11358), possession of marijuana for sale (Health & Saf. Code, §11359), and possession of

concentrated cannabis (Health & Saf. Code, §11357, subd. (a)). On November 15, 1983, after consideration of the preliminary hearing transcript and live testimony, the superior court denied defendant's motion for suppression of all the evidence seized in the July 29, 1982, raid on defendant's ranch.

On December 5, 1983, pursuant to a plea bargain, defendant pleaded guilty to the courts of the information charging him with cultivation of marijuana and possession of concentrated cannabis. The trial court, thereafter, suspended imposition of defendant's sentence and placed him on probation for five years, with conditions, including payment of a $5,000 fine and service of 100 days in the county jail. The count of the information charging defendant with possession of marijuana for sale was dismissed pursuant to the plea bargain.

The trial court allowed the defendant to remain free on bail pending the outcome of this appeal.

Aerial Surveillance

Defendant contends that officers looking at his ranch from the air was a warrantless general search, violative of the state and federal Constitutions. Defendant relies particularly on People v. Ciraolo (1984) 161 Cal.App.3d 1081, cert. granted June 3, 1985, ___U.S.____ [86 L.Ed. 2d 691, 105 S.Ct. 2672]; Dow Chemical Co. v. U.S., by and through Gorsuch (E.D.Mich. 1982) 536 F.Supp. 1355; and People v. Sneed (1973) 32 Cal.App.3d 535.

The People trace the development of California decisional law on aerial surveillance, and conclude that this body of law[1/] overwhelmingly supports the

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1/ People v. Sneed, supra, 32 Cal.App.3d 535 (reversing conviction based on

warrantless seizure after helicopter surveillance); Dean v. Superior Court (1973) 35 Cal.App.3d 112 (refusing to mandate superior court to set aside indictment based on warrantless seizure after airplane surveillance); People v. Superior Court (Stroud) (1974) 37 Cal. App.3d 836 (mandating superior court to set aside its order suppressing evidence seized without warrant after helicopter surveillance); Burkholder v. Superior Court (1979) 96 Cal.App.3d 421 (upholding reasonableness of aircraft surveillance, but mandating superior court to suppress evidence seized in ensuing ground search without warrant); People v. St. Amour (1980) 104 Cal.App.3d 886 (affirming conviction based on seizure pursuant to search warrant after plane surveillance); People v. Joubert (1981) 118 Cal.App.3d 637, opinion after remand (1983) 140 Cal. App.3d 946 (upholding reasonableness of airplane surveillance, but remanding for hearing on omissions from affidavit in support of a search warrant); Tuttle v. Superior Court (1981) 120 Cal.App.3d 320, cert. den. (1981) 454 U.S. 1033 [70 L. Ed.2d 477, 102 S.Ct. 571] (upholding reasonableness of aerial surveillance, but prohibiting prosecution because of improper nighttime service of search warrant); People v. Egan (1983) 141 Cal. App.3d 798 (reversing judgment of dismissal entered after suppression of evidence seized pursuant to search warrant ensuing from aerial surveillance); People v. Ciraolo, supra, 161 Cal.App.3d 1081 (reversing conviction based on seizure pursuant to search warrant after airplane surveillance).

reasonableness of such surveillance.

The seizure found to be unreasonable in People v. Sneed, supra, 32 Cal.App.3d 535, was without warrant and, therefore, presumptively unreasonable. The seizures in this case were pursuant to search warrant and, therefore, presumptively reasonable. Sneed is thus distinguishable from this case and does not aid defendant.

In Dow Chemical Co. v. U.S., by and through Gorsuch, supra, 536 F.Supp. 1355, the federal district court enjoined aerial surveillance which the Environmental Protection Agency ordered to investigate suspected violations of the Clean Air Act. However, reversal by the Sixth Circuit Court of Appeals has stripped the district court's opinion of its precedential value. (Dow Chemical Co. v. United States (1984) 749 F.2d 307, cert. granted June 10, 1985, ____U.S.____ [86 L.Ed.2d

716, 105 S.Ct. 2700].)

People v. Ciraolo, supra, 161 Cal.App.3d 1081, is also distinguishable from this case. The aerial observation under attack in Ciraolo was of "the back yard of a Santa Clara home." (Id., at p. 1085.) The Ciraolo court uses a classical curtilage analysis to conclude that an urban backyard enjoys constitutional protection from police overflights.[2/] (Id. at pp. 1087-1090; cf. Oliver v. United States (1984) 466 U.S. 170 [80 L.Ed.2d 214, 224-225, 104 S.Ct. 1735, 1741-1742] [cited by both parties].) The geographical setting in this case, a ranch, is significantly different.

2/ Whether a distinction between curtilage and noncurtilage areas is an appropriate approach from which to analyze the reasonableness of aerial surveillance is open to question. (See United States v. Bassford (D.Me. 1985) 601 F. Supp. 1324, 1331.)

". . . The appellate courts of this state have consistently upheld aerial surveillance from lawful altitudes over rural and relatively unpopulated property." (People v. Egan, supra, 141 Cal.App.3d at p. 806.) We are in agreement with these holdings.

Defendant's ranch was unquestionably rural property. Therefore, safety-conducted airplane flights at altitudes of 500 feet or more over the ranch surface were lawful. (Pub. Util. Code, §21403; 14 C.F.R. §91.79, subd. (c).) The evidence before the trial court in this case abundantly supported a finding that the flights of the officers were at lawful altitudes. Although one defense witness testified that an airplane circled over defendant's ranch as low as two or three hundred feet above the top of a hill, that witness could not identify the plane in question as being

similar to either of the airplanes used by the officers, and conceded, "There is [sic] planes flying over there all the time . . . ."

We conclude that the aerial surveillance in this case violated no constitutional proscription.

We are aware that cases involving attacks on the constitutionality of aerial surveillance are now pending before the California Supreme Court,[3/] but even should it rule that aerial surveillance such as occurred in this case violates the state or the federal Constitution, that determination would not compel suppression of evidence or reversal of defendant's conviction.

3/ People v. Mayoff (1983) 150 Cal.App. 3d 7 (hg. granted March 22, 1984, Crim. 23608); People v. Cook (1984) 151 Cal. App.3d 1121 (hg. granted April 19, 1984, Crim. 23651); People v. Agee (1984) 153 Cal.App.3d 1169 (hg. granted May 24, 1984, Crim. 23738).

Inasmuch as the search and seizures of which defendant complains, and the crimes of which he was convicted, all took place after June 8, 1982, article I, section 28, subdivision (d) (the "truth-in-evidence" provision) of the California Constitution applies to this case. (People v. Smith (1983) 34 Cal.3d 251, 262.) Under truth-in-evidence, there are no independent state grounds for suppression of evidence, and only the federal exclusionary rule applies. (In re Lance W. (1985) 37 Cal.3d 873, 890.[4/] Under the federal exclusionary rule, evidence seized in objective good faith reliance on an invalid search warrant is admissible. (United States v. Leon (1984)

4/ In his opening brief, defendant makes a strenuous argument for exclusion of evidence on independent state grounds in this case. In re Lance W. which was filed after defendant filed his opening brief, refutes all of defendant's argument, as we see no more of it in defendant's reply brief.

___U.S.____ [82 L.Ed.2d 677, 104 S.Ct. 3405].) The rule announced in Leon applies in all federal prosecutions, through the supervisory power of the United States Supreme Court over the federal trial courts. (See Weeks v. United States (1914) 232 U.S. 383 [58 L.Ed. 652, 34 S.Ct. 341].) The same federal rule applies to state criminal prosecutions as well, through the operation of the Fourteenth Amendment. (Massachusetts v. Sheppard (1984) ___ U.S.____ [82 L.Ed.2d 737, 104 S.Ct. 3424]; cf. Mapp v. Ohio (1961) 367 U.S. 643, 655.) This rule operates retroactively, to allow admission of evidence seized before the rule was announced. (United States v. Henderson (9th Cir. 1984) 746 F.2d 619, 625, cert. granted Oct. 15, 1985 [___L.Ed. 2d____, 106 S.Ct. 225]; United States v. Hendricks (9th Cir. 1984) 743 F.2d 653, cert. den. (1985) ____U.S.____ [84 L.Ed.

2d 382, 105 S.Ct. 1362].)

People v. Ciraolo, supra, 161 Cal.App.3d at pp. 1085-1086, holds that the rule announced in Leon cannot apply when a search warrant is invalid because that warrant is based on information which is the fruit of a warrantless overflight which constitutes an unconstitutional search, relying on Segura v. United States (1984) ____U.S.____ [82 L. Ed.2d 599, 104 S.Ct. 3380]. This holding is incorrect. It misperceives the reason why the Segura court did not apply Leon.

In Segura v. United States the court did not apply Leon because there was no need to do so. The search warrant pursuant to which officers seized evidence in Segura, unlike the search warrant in Ciraolo, was valid, and the United States Supreme Court logically concluded that the Fourth Amendment did not require suppression of evidence

discovered and seized during execution of the valid warrant. On the other hand, when a search warrant is invalid, Leon can apply in a variety of situations which leads to the invalidity. In Leon itself, the warrant was invalid because unsupported by probable cause. In Massachusetts v. Sheppard, supra, ____ U.S.____, the warrant was invalid because of a completely inaccurate description of the evidence to be seized. In United States v. Henderson, supra, 746 F.2d 619, the warrant was arguably invalid, if United States v. Karo (1984) ____U.S. ____ [82 L.Ed. 530, 104 S.Ct. 3296] (limiting the use of beeper surveillance; cf. United States v. Knotts (1983) 460 U.S. 276) were to be given retroactive effect.

In this case, if the warrantless overflights of defendant's ranch were unreasonable searches, the fruits of

those unconstitutional activities could not support a valid search warrant, and the issuing magistrate would have made a mistake by issuing an invalid warrant. (See People v. St. Amour, supra, 104 Cal. App.3d at p. 891.) Under these circumstances, in applying Leon, a reviewing court would need to determine whether the officers who raided defendant's ranch were behaving reasonably in relying on such an invalid warrant. Leon formulates the test of reasonableness as follows: "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." (United States v. Leon, supra, ____U.S. at p. _, fn. 23 [82 L.Ed. 2d at p. 698, fn. 23, 104 S.Ct. at p. 3421, fn. 23].) As of July, 1982, when the search in this case took place, a reasonably well-trained officer might have known the following.

Such an officer could have been reasonably confident that a search warrant based on information obtained by means of an unreasonable search from an airplane or helicopter was no good. (See People v. St. Amour, supra, 104 Cal.App.3d at p. 891.) He or she would also have known that in recent years appellate court decisions had consistently upheld the reasonableness of aerial surveillance conducted from lawful altitudes. If the officer were unusually knowledgeable, he or she would know that the then most recent published appellate court discussion of the constitutionality of aerial surveillance in California, People v. Joubert, supra, 118 Cal.App.3d 637, had made the following pronouncements. "[A]nyone who grows marijuana in the open today does so at the risk of being spotted by flying police officers." (Id., at p. 646.) "[A]nyone who grows marijuana in

an open field does not have an objectively reasonable expectation of privacy insofar as overflight at lawful altitudes." (Id., at p. 647.) The officer might have known that a more recent case, Tuttle v. Superior Court, supra, 120 Cal.App.3d 320, 327, had disposed of the aerial surveillance issue without discussion, in a single sentence, saying, "The contention by petitioners that the aerial surveillance violated petitioners' reasonable expectations of privacy is without merit," citing Joubert and St. Amour. The officer might have known that in United States v. DeBacker (W.D.Mich. 1980) 493 F.Supp. 1078 the federal district court upholds a seizure of marijuana pursuant to search warrants issued on the basis of information obtained by state police officers flying in a plane at an altitude of 50 feet above a farm. The officer might have known that in United States v. Allen (9th Cir. 1980)

675 F.2d 1373, cert. den. (1981) 454 U.S. 833 [70 L.Ed.2d 112, 102 S.Ct. 133], the federal circuit court upholds an aerial surveillance from a Coast Guard helicopter which led to interdiction (without warrant) of an amphibious operation to import marijuana on the Oregon coast. The officer might have known that the seizure condemned in People v. Sneed, supra, 32 Cal.App.3d 535, was not only without warrant, but resulted from observations from a helicopter hovering 20 to 25 feet above Sneed's backyard. (Id., at pp. 540, 542.) In short, a reasonably well-trained officer would be fully justified in believing in the validity of the search warrant issued in this case, and the more knowledgeable that officer was, the more justified his or her belief would be.

In accord with Leon, the trial court in this case committed no error in

refusing to suppress evidence, even if the California or United States Supreme Court were to announce a new rule compelling the conclusion that the officers acted in violation of the federal Constitution in flying over defendant's ranch.

Presence of ABC Camera Crews

Defendant contends that the presence of news crews at the time the officers searched his ranch violated Penal Code section 1530[5/] and compels suppression of the evidence then seized. Defendant cites no case law in support of this contention.

The People make a multiphase, "even if" argument, as follows. Section 1530 was not violated, the presence of news cameras is nothing to complain about

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5/ Penal Code section 1530 provides: "A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

because it benefited defendant, serving to deter potential unlawful behavior by the officers. Even if the violation worked to defendant's detriment, rather than his benefit, it would not rise to constitutional stature. Even if the violation did achieve constitutional stature, it had no causal relationship with the seizures about which defendant complains.

The first phase of the People's multiphased argument is enough. Penal Code section 1530 prohibited the news crews from participating in the service of the search warrant. Defendant concedes, "No claim can be made here that ABC News provided even the slightest bit of assistance to the executing officers." Thus, defendant's own concession establishes the lack of merit to his contention that the presence of the news crews, in and of itself, constituted a

violation of statute.

* * *

The judgment is affirmed.

Holmdahl, J.

I CONCUR:

Elkington, J.

People v. Berger
AO 26332

Concurring Opinion

Given the overriding circumstance that the constitutional validity of aerial overflights is currently under review in our state and federal high courts (see, e.g., People v. Mayoff (Crim. 23608, hg. granted March 22, 1984); People v. Cook (Crim. 23651, hg. granted April 19, 1984); People v. Agee (Crim. 23738, hg. granted May 24, 1984); People v. Ciraolo (1984) 161 Cal.App.3d 1081, cert. granted June 3, 1985, ____U.S.____ [86 L.Ed.2d 691]), considerations of judicial economy alone justify deferral herein, as the parties expressly acknowledged during argument. Pending further authoritative enlightenment, it would appear that the challenged search meets constitutional muster under existing controlling precedents. (See United

States v. Leon (1984) 468 U.S. ____ [82 L.Ed.2d 677, 104 S.Ct. 3405], rehg. den., 82 L.Ed.2d 942; In re Lance W. (1985) 37 Cal.3d 873, 890.)

Accordingly, I concur in the result.

Racanelli, P. J.

FILED
Dec 23 1985
Court of Appeal - First Dist.
Ron D. Barrow, Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

Date: November 15, 1983

Hon. Robert A. O'Farrell, Judge;
, Bailiff;
, Deputy Clerk;
, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SAUDJIE SHOSHANNA BERGER and
MARC LEE BERGER,

Defendants.

No. MCR 4878

Minute Order:
DECISION RE MOTION PURSUANT
TO SEC. 1538.5 PENAL CODE

Appearances: None

Motion to Suppress under

Section 1538.5 Penal Code is denied.

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ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 1

No. AO26332

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

MARC LEE BERGER

Appellant's petition for review DENIED.

Bird, C.J., Broussard, J. and Reynoso, J., are of the opinion the petition should be granted.

Bird
Chief Justice

Supreme Court
FILED
Mar 20 1986
Laurence P. Gill, Clerk